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Supreme Court of the United States

OCTOBER TERM, 1949

No. 783

CLARENCE JACKSON,

Petitioner,

against

EDMUND J. BUTHAZEL, Warden of the City Prison, Borough of Manhattan, 125 White Street, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

OCTOBER TERM, 1949

CLARENCE JACKSON,

Petitioner,

against

HERMAN J. RUTHAZER, Warden of the City Prison, Borough of Manhattan, 125 White Street, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit affirming the decision of the United States District Court for the Southern District of New York, which Court dismissed petitioner's writ of habeas corpus without requiring a hearing thereon.

I

Summary Statement of the Matter Involved

Filed herewith is the record on appeal from the Supreme Court of the State of New York, County of New York, which record is referred to herein and in petitioner's brief filed herein as "State Record", and numerical references are to folios therein.

The certified transcript of record in the United States Court of Appeals for the Second Circuit filed herein is hereinafter referred to as "Circuit Record".

A. Proceedings in Federal Courts.

This action commenced by petitioner filing a petition for a writ of habeas corpus, which writ was issued on January 16, 1950. On January 31, 1950, petitioner filed a supplemental petition and respondent filed a return. On the same date a motion was made by respondent to dismiss the writ of habeas corpus without a hearing thereon. Argument was heard on said motion and briefs filed and decision reserved. On the 20th day of February, 1950, the District Court of the United States for the Southern District of New York by order duly entered upon an opinion filed on the 15th day of February, 1950, dismissed said writ of habeas corpus.

A notice of appeal was filed in the above named court on February 20, 1950, and on the same date an appeal was allowed to the United States Court of Appeals for the Second Circuit. Said appeal was argued on March 1, 1950, and on March 17, 1950, the United States Court of Appeals for the Second Circuit, by opinion filed, affirmed the decision of the District Court of the United States for the Southern District of New York.

B. Prior proceedings in the State Court.

The petitioner herein, on the 18th day of May, 1949, secured a writ of habeas corpus from the Supreme Court, New York County, to inquire into the cause of detention of petitioner under a rendition warrant issued by the Governor of New York upon the demand of the Governor of Georgia alleging that petitioner was a fugitive from justice in the State of Georgia. That after a hearing said State Court dismissed said writ of habeas corpus on the 21st day of June, 1949.

On appeal, an order was entered upon the decision of the Appellate Division of the Supreme Court, First Department, in the office of the Clerk of the court on the 12th day of December, 1949, unanimously affirming a final order of the Supreme Court, New York County, entered in the office of the Clerk of said county on the 21st day of June, 1949, dismissing petitioner's writ of habeas corpus and remanding him to custody pursuant to a rendition warrant issued by the Governor of Georgia alleging that the relator was a fugitive from justice in the State of Georgia.

On the 12th day of January, 1950, the Court of Appeals of the State of New York denied petitioner's application for leave to appeal to the Court of Appeals and for a stay of proceedings thereunder.

On the 13th day of January, 1950, Mr. Justice Stanley H. Fuld of the Court of Appeals of the State of New York dismissed petitioner's application for a stay of proceedings pending application for a writ of certiorari to the United States Supreme Court on the grounds of lack of jurisdiction.

On the 14th day of January, 1950, Associate Justice Robert H. Jackson of the United States Supreme Court denied petitioner's application for a stay of proceedings pending application for a writ of certiorari to the United States Supreme Court.

Petitioner secured a writ of habeas corpus in the United States District Court for the Southern District of New York on the 16th day of January, 1950, returnable on January 17, 1950. On said return date Judge Irving Kaufman informed petitioner that he believed that said petition for a writ of habeas corpus was defective for failing to exhaust state remedies unless petitioner petitioned the United States Supreme Court for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and further petitioned each of the justices of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, who participated in said order of unanimous affirmance

for a stay of proceedings and if said stay was not there granted, thence to each justice of the United States Supreme Court for a stay of proceedings pending said application. Mr. Justice Kaufman adjourned said proceeding until January 31, 1950, in order to allow petitioner to make said applications.

On the 18th day of January, 1950, your petitioner, pursuant to Section 28.2101(e) of the United States Code and Rule 38(6) of the United States Supreme Court, made application to each of the justices of the Appellate Division, First Judicial Department of the Supreme Court, State of New York, for a stay of proceedings pending application to the United States Supreme Court for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and said application was denied on the 18th day of January, 1950.

On the 20th day of January, 1950, your petitioner, pursuant to Section 28.2101(e) of the United States Code and Rule 38(6) of the United States Supreme Court made application to each of the Justices of the Supreme Court of the United States for a stay of proceedings pending application to the United States Supreme Court for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. That on the 20th day of January, 1950, said application was denied by Chief Justice Vinson of the United States Supreme Court. That on the 21st day of January, 1950, said application was denied by Associate Justices Reed, Burton and Clark of the United States Supreme Court. That on the 23rd day of January, 1950, said application was denied by Associate Justices Frankfurter and Minton of the United States Supreme Court.

C. Issues raised in the District Court and its decision therein.

Petitioner's petition in the United States District Court for the issuance of the writ of habeas corpus alleged that he had been deprived of certain of his constitutional rights. In effect these allegations were:

a. That in the State Court proceeding he had been a victim of surprise resulting from respondent's securing of an ex parte adjournment and thereafter reopening the hearing notwithstanding that both sides had previously rested their respective cases and decision had been reserved.

b. That petitioner found out after the State Court decision had been rendered that a great number of respondent's exhibits, accepted by the Court, were either procured by fraud or fraudulently executed.

c. That petitioner was precluded from relief in the State Court in any event.

d. That petitioner had been subjected to cruel and unusual punishments while a prisoner in the State of Georgia and believed that he would be further brutally treated and would be deprived of his life without due process of law if rendered to the State of Georgia.

The respondent's return set forth the procedural requirements of petitioner's custody in respondent as well as a history of the State Court proceedings.

The respondent on the adjourned return day moved to dismiss the writ of habeas corpus without a hearing on the merits on the ground that the petitioner admitted the requisition and warrant were proper, that petitioner is the person therein named and that he was convicted of a crime and sentenced to imprisonment in Georgia and fled therefrom. Respondent further, in support of said motion, claimed that the State Court proceedings should be a barrier to any relitigation in the Federal Court.

The petitioner in opposition to said motion to dismiss claimed that there was no way possible for him to secure relief in the State Court inasmuch as the ruling case law of the State of New York denies relief to a fugitive who has been subjected to cruel and unusual punishments. Petitioner further claimed that the facts surrounding the re-

opening the State Court proceeding were such that in any event he would be unable to secure proper relief due to the surprise and the fraudulent evidence produced by the respondent, and further that he was entitled to be heard in the Federal Courts as a matter of law.

On the 20th day of February, 1950, by order duly entered upon an opinion filed on the 15th day of February, 1950, the District Court dismissed said writ of habeas corpus without a hearing on the merits.

The District Court in dismissing said writ without a hearing held in its opinion:

a. That any invasion of petitioner's constitutional rights could be asserted in the Georgia Courts upon petitioner's return;

b. That the matters presented to the District Court were identical to those submitted to the State Court, including petitioner's rights under the United States Constitution;

c. That the only criticism the petitioner has concerns certain affidavits which the findings and decision show were not the basis of any finding;

d. That the case of *Johnson* v. *Dye,* 175 Fed. (2d) 250, reversed on other grounds 338 U. S. 86, reversed by the United States Supreme Court in a per curiam decision was thought to indicate a complete disapproval of the Third Circuit Court of Appeals decision therein; and

e. That alleged brutal treatment of a prisoner and fear of assassination cannot be considered on an application for a writ of habeas corpus.

D. Issue raised in and decision of Circuit Court of Appeals.

The points raised on appeal were substantially the same as those outlined in the District Court proceedings. Petitioner argued that he was entitled to a hearing in the Federal Court based upon his application for the writ of habeas corpus and further argued that the reversal of *Johnson* v. *Dye* by the United States Supreme Court was a reversal predicated solely upon the relator therein having failed to exhaust his available state remedies. Petitioner further raised the point that he had sufficient evidence available to corroborate his testimony as well as to completely controvert the respondent's testimony that would show without question that prisoners in the penal camps of the State of Georgia are subjected to cruel and unusual punishments and that this evidence first became available after the respondent had reopened the State Court hearing and the decision in the State Court had been rendered. Petitioner further stated that he had orally petitioned the justice presiding at the State Court proceeding to reopen the hearing so as to present this evidence, but petitioner was informed that a reopening would not be granted.

The respondent maintained the same position taken in the District Court in arguing for an affirmance.

The Court of Appeals affirmed the decision of the District Court by opinion holding that petitioner had been afforded a full and fair hearing in the State Court that went fully into the merits of the testimony presented on each side and that his rights had been fully protected. The Court of Appeals further interpreted the *Johnson* v. *Dye*, supra, reversal by the United States Supreme Court to indicate only that the relator therein had not exhausted his state remedies whereas in the instant case the Court of Appeals held that all state remedies had been exhausted.

II

The Opinions Below

Neither the opinion in the Circuit Court of Appeals for the Second Circuit nor the opinion of the United States District Court for the Southern District of New York have yet been officially reported and appear in the certified transcript of record in the Circuit Court of Appeals filed herein.

The opinion in the Supreme Court of the State of New York, New York County, is reported at 196 N. Y. Misc. 34, 90 N. Y. S. (2d) 205, and will be further found in the State Record submitted herein with this petition at folios 601-644.

III

Jurisdiction

The judgment of the Court of Appeals was entered March 17, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. C. §1254.

IV

Statutes Involved

The pertinent provisions of the Code are set out in the appendix to this petition at pages 29-30.

V

Questions Presented

1. Under Title 28, §2243, U. S. C., does not a Federal District Judge have the mandatory duty to hear on the merits a habeas corpus petition, which is the first application made by the petitioner to a Federal Court, containing facts supporting the claim that a basic Federal constitutional right is being violated, irrespective of a hearing on the merits of a petition requesting similar relief in a State Court?

2. Does not the record and the opinion of the Federal District Court herein show that the court did not exercise its discretion in dismissing the writ of habeas corpus but rather it dismissed the writ on the ground that the remedy of habeas corpus was not available in the Federal Court in the renditing State in a rendition proceeding where the claim was prior and threatened future cruel and unusual punishments?

3. Does not the petition in the Federal District Court set forth new matter entitling petitioner to a hearing on the merits of his petition?

4. Should a previous State Court proceeding holding explicitly and specifically that it had no jurisdiction or power to grant the requested relief thwart an application to a Federal Court where the State Court recognized that such relief might be granted in a Federal Court?

5. Is cruel and unusual punishments a basis for relief by way of habeas corpus in a Federal Court in the renditing State?

VI

Reasons Relied Upon for Allowance of the Writ

1. The question of what is the effect of exhausting state remedies on the right to go into a federal court to seek a writ of habeas corpus has never before been considered by this court. Furthermore, this case represents the first time that the issue has ever been presented to any court. The matter is not only of vital concern to those who would seek the protection of the great writ but involves fundamental questions considering the relationship between the federal and state sovereignities in the exercise of their coordinate power over habeas corpus. Earlier in this term this court in *Darr* v. *Burford,* No. 51, October Term, 1949, April 3, 1950, considered the question of what a petitioner had to do to exhaust his state remedies; now for the first time this court has before it the question of the effect of a petitioner in a habeas corpus proceeding having exhausted his state remedies. Doubts respecting this issue should not go unresolved.

2. This petition raises an unsettled and recurring question concerning the interpretation of an important federal statute. It is felt that precisely the same question led this court to grant a writ of certiorari in *Dennis* v. *Taylor,* 335 U. S. 898. But the matter was not resolved because the court affirmed the judgment below by an equally divided court. *Dennis* v. *Taylor,* 336 U. S. 907. The need to finally determine such an important question dealing with the proper administration of justice in the federal court, of course, still remains. This case presents the occasion to settle it.

3. This court on several occasions has stated that where life is at stake it is more inclined to grant a petition for certiorari. If the petitioner's allegations in his petition

for habeas corpus are true sending him back to Georgia will be of greater concern to this court than is the case where a person is under sentence of death because of court proceedings, since in the instant case the petitioner will be deprived of his life, even though a court has never sentenced him to death, in a manner prohibited by the Constitution and the fundamental theory of a liberty loving people.

4. The question of cruel and unusual punishments as a ground for the renditing State not to be permitted to surrender a fugitive has been before two United States Courts of Appeals. In *Johnson* v. *Dye,* 175 Fed. (2d) 250 (reversed on other grounds 338 U. S. 86), it was held that a state should be prohibited from surrendering a fugitive under such circumstances. And the Court of Appeals below, herein, did not indicate disagreement with such a holding. State Courts, however, have denied such a federal right. Furthermore, lower federal courts indicate that they think that this court's reversal in *Johnson* v. *Dye,* supra, is a holding that there is no such federal right. This is a matter which should be finally settled. It can be done by this court reaching that question after it has decided the procedural question in favor of this petitioner or it can refer the matter back to the Court of Appeals for the Second Circuit for its determination.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit herein.

Respectfully submitted,

CURTIS F. MCCLANE,
Counsel for Petitioner.

Dated: April 28, 1950.

Supreme Court of the United States

OCTOBER TERM, 1949

CLARENCE JACKSON,

Petitioner,

against

HERMAN J. RUTHAZER, Warden of the City Prison, Borough of Manhattan, 125 White Street, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

Petitioner was entitled to a hearing in the United States District Court on his petition for habeas corpus and the dismissal of the writ without a hearing constituted reversible error.

A. Under the applicable statutes the granting of a hearing on a writ of habeas corpus is not a matter of discretion but a matter of right where custody in violation of the Constitution is alleged and the matter does not come within any statutory exception.

Title 28, §2241, of the United States Code grants to the several courts of the United States and judges therein the power to grant writs of habeas corpus. The power extends itself to one in custody in violation of the Constitution or laws or treaties of the United States. *Title 28, §2243,* is mandatory in such an event by requiring that the writ or order to show cause shall be directed to the person

having custody of the person detained and unless the application and return present only issues of law the body of the person detained shall be produced at the hearing and the court shall summarily hear and determine the facts and dispose of the matter as law and justice require.

There are only three instances contained in the statute where the writ may be refused if custody in violation of the Constitution is alleged. The first instance is where the application and return present only issues of law (*Title 28, §2243,* U. S. C.); the second is where "the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry" (*Title 28, §2244, U. S. C.*); and the third instance is where the petitioner has failed to exhaust all available remedies in the State Court where the petitioner is in custody pursuant to a judgment of a State Court (*Title 28, §2254, U. S. C.*).

The instant case does not fall within any of these statutory exceptions which allows the use of discretion in determining whether or not the writ shall issue and a hearing proceed thereunder. In the instant case the petition and return raise issues of fact which have never been "determined by a judge or court of the United States on a prior application" and petitioner herein has exhausted all available remedies in the State Court.

The failure of the District Court to proceed to a hearing herein on the merits of the petition constituted reversible error.

B. Even if the granting of the hearing had been within the discretion of the District Court, the dismissal of the writ herein without a hearing would constitute an abuse of discretion due to the new matter alleged by petitioner.

The writ of habeas corpus has been typified as the most inviolate process in our judicial system. The purpose of

the writ is to test the legality of any detention. The granting of the writ and a hearing thereon is not a matter of discretion where issues of fact are raised. It is only a matter of discretion in certain narrow instances set forth in the statute, none of which instances is present herein. Nonetheless, even if the granting of the hearing had been a matter of discretion, the failure to grant the hearing herein by the District Court would be an abuse of discretion due to the issues of fact raised by petitioner's petition which have not been litigated by a court or judge of the United States.

The matter alleged by petitioner herein was substantial in nature and on the face of the petition entitled him to a determination on the merits. These facts showed prima facie that petitioner did not receive a fair and impartial inquiry in the State Court as contemplated by the statutes and applicable decisions. It therefore follows that petitioner's contentions have not been litigated.

Petitioner alleged in the District Court that he had been deprived of his constitutional rights in the State Court proceeding in that:

1. Respondent was granted an ex parte adjournment and subsequently secured a reopening of the hearing after both sides had rested and decision had been reserved and that such constituted a surprise to petitioner.

2. Petitioner, after decision had been rendered, found that many of respondent's exhibits had been either fraudulently procured or fraudulently executed.

3. The State Court lacked jurisdiction to grant petitioner relief for cruel and unusual punishments.

The circumstances surrounding these claims are hereinafter discussed in the foregoing order.

(1) Ex Parte Adjournment and Surprise

Upon the close of the hearing in the State Court on May 23, 1949, both petitioner and respondent rested (*State Record* 28, 132, 133), decision was reserved with both sides to submit briefs on or before June 6, 1949 (*State Record* 28, 137, 149-153). The petitioner assumed that all proof was in and that no additional proof would be required for the deciding of his application. Thereafter, respondent, without notice of any sort to petitioner, secured an adjournment to June 16, 1949. After the adjournment had been secured, petitioner's counsel was notified by telephone by Salvatore J. Camp, Esq., Deputy Assistant District Attorney, of counsel in the State Court for respondent. Petitioner's counsel inquired of Mr. Camp the reasons for securing the adjournment. Mr. Camp stated that he was not at liberty to state the reasons other than that the head of his bureau in the District Attorney's office had ordered him to secure the adjournment. Thereafter petitioner's counsel made repeated inquiries for information relating to reasons for securing the adjournment but Mr. Camp would not divulge the reasons.

On June 16, 1949, respondent's motion to reopen the proceeding was granted and then for the first time petitioner learned the reason why respondent secured the ex parte adjournment. The State of Georgia had requested the District Attorney's office to adjourn the matter so that they could appear and present testimony and exhibits. Appearances were made on June 16, 1949 by the Attorney General of the State of Georgia and Solicitor General of Fulton County, Georgia, as well as Assistants of both the Attorney General and the Solicitor General. Voluminous testimony and exhibits were then presented to the State Court.

Petitioner was not appraised in any way of the fact that application was going to be made for a reopening or that additional testimony and evidence were going to be introduced, nor was petitioner given any opportunity to

prepare himself, and this essentially constituted a "surprise" to petitioner. It deprived him of an opportunity of rebutting respondent's testimony. If notice had been given that the proceeding might be reopened, petitioner would have been prepared to come forward with the necessary rebuttal evidence.

When the respondent made his application to reopen the hearing the petitioner objected (*State Record* 158) and was overruled (*State Record* 161), and further, at the close of the hearing, moved to strike out all of the testimony and evidence theretofore received and said motion was denied (*State Record* 386-390).

After decision had been rendered petitioner orally requested a reopening from Mr. Justice Hammer so that he might have an opportunity to controvert the material presented on the respondent's reopening but petitioner was informed that such an application would not be granted. The reopening of the hearing and the reception of the respondent's evidence constituted a surprise to petitioner and was prejudicial to him. The fact that said prejudice resulted is evidenced by the statement of the State Court at the conclusion of the hearing:

> "I had thought that as the matter stood before me up until yesterday when the representatives of the State of Georgia had appeared in court that the matter could be readily decided, although naturally it would take a considerable labor to consider the facts and the law applicable and then determine what should be done as a matter of justice and equity * * *" (*State Record* 448).

This statement was made by the court after the conclusion of the reopened hearing. It seems obvious from the use of the words "I had thought * * * up until yesterday * * * the matter could be readily decided * * *" that the granting of the ex parte adjournment coupled with the subsequent reopening without any prior notice of said applications was so prejudicial that it deprived petitioner of any possibility of having his writ sustained.

(2) Fraudulently Procured or Executed Exhibits

An examination of the following affidavits, acknowledged statements and letters accepted by the State Court show such irregularities in execution that they should have been excluded when objected to by petitioner (*State Record* 157-162, 323-328), and failure to exclude them resulted in all questions of fact being determined by consideration of fraudulently procured evidence.

(a) *Supplemental return* (*State Record* 490-600).

1. W. P. Allison (*State Record* 574-582)—This statement is dated June 9, 1949 (*State Record* 575), the acknowledgment is dated June 11, 1949 (*State Record* 578), whereas the Clerk of the Superior Court, Fulton County, Georgia, executed and issued his certificate of authentication of the notary's signature and commission on June 8, 1949 (*State Record* 580-581)—one day *prior* to the signing of the statement and three days *prior* to the execution of the acknowledgment.

2. Rev. H. C. Carswell (*State Record* 583-588)—The statement is dated June 9, 1949 (*State Record* 583), the acknowledgment is dated June 11, 1949 (*State Record* 586), whereas the Clerk of the Superior Court, Fulton County, Georgia, executed and issued his certificate of authentication of the notary's signature and commission on June 8, 1949 (*State Record* 587-588)—one day *prior* to the signing of the statement and three days *prior* to the execution of the acknowledgment.

3. Mrs. P. Y. Mathews (*State Record* 589-599)—This statement shows that the Clerk of the Superior Court's certificate of authentication was also issued on June 8, 1949 (*State Record* 596-

599)—three days *prior* to the execution of the acknowledgment (*State Record* 593) and jurat (*State Record* 596).

(b) *Exhibit 13, acknowledged letter of Paul McDonald, M.D.* (*State Record* 466-472).

The Clerk of the Superior Court's certificate is dated June 8, 1949 (*State Record* 470-472)—three days *prior* to the taking of the acknowledgment dated June 11, 1949 (*State Record* 469).

(c) *Exhibit 14, affidavit of A. A. Clarke* (*State Record* 473-479).

The Clerk of the Superior Court's certificate is dated June 8, 1949 (*State Record* 478, 479), four days *prior* to the affidavit, the jurat and the acknowledgment, which are all dated June 14, 1949 (*State Record* 475-477).

Therefore, irrespective of any other reason for excluding this matter (i.e., lack of an opportunity to cross-examine the affiants), the irregularities on the face of these exhibits and those contained in the supplemental return should have invalidated the supplemental return and all proceedings had thereunder in the State Court.

If only one of the certificates showed a variance it could be, and most likely would have been, the result of a clerical error. However, that is not the case here, instead, three of the statements attached to and forming part of the supplemental return and two of the respondent exhibits show these irregularities.

It is an inescapable conclusion that the Clerk of the Superior Court's certificates were issued *prior* to the affixing of the affiants' signatures as well as *prior* to the execution of any of the notary public's acknowledgments and jurats and constituted such an irregularity as to be tantamount to fraud and the consideration of this fraudu-

lently procured and executed evidence by the State Court precluded any possibility of a question of fact being determined in respondent's favor inasmuch as the State Court in its opinion gave great weight to the supplemental return and exhibits (*State Record* 625-630, 643).

(3) In Any Event Petitioner Could Not Secure State Court Relief For Cruel and Unusual Punishments

The only ground relied upon by petitioner, after finding the executive warrant in proper form, for relief in the State Court was "cruel and unusual punishments" stemming from past brutalities experienced by him as well as the possibility of the infliction of future brutalities upon him and deprivation of his life without due process of law if rendered to the demanding state.

The petitioner admitted the regularity of the executive warrant and his identity and presence in the demanding state at the time of the offense charged. However, petitioner claimed, the perpetration of cruel and unusual punishments on his person as well as overt attempts to take his life by prison officials in the demanding state plus his belief that he would be deprived of his life if returned to Georgia all was in violation of his rights under the United States Constitution and the New York State Constitution and was sufficient basis at law for discharge from custody by writ of habeas corpus in the State Courts. All of the foregoing was alleged in his petition for the writ in the State Court and further was embellished by the petitioner's testimony.

Mr. Justice Hammer, by opinion filed in support of the order dismissing the writ of habeas corpus in the State Court, stated in part that where

> "it appears the crime charged, and of which the relator has been convicted, sentenced and imprisoned, is a felony under the laws of both the demanding and remanding states, that relator is a fugitive from justice and as such the individual named in the warrant and requisition. Under such circumstances the relator's

writ should be dismissed and relator remanded to custody for delivery to the agents of the remanding state * * * (cases cited) * * *" (*State Record* 602-603).

Then Mr. Justice Hammer discusses the evidence presented and purportedly bases his decision dismissing the writ on a question of fact. Nonetheless, further the decision points out that the New York courts,

"while controlled by the Constitution and applicable laws of the United States, is subject to the controlling decisions of the highest courts of the State of New York and the procedure and practice of New York. This was aptly pointed out by our Court of Appeals in the Matter of Morehouse v. N. Y. Supreme Court (213 N. Y., 131, 139), in which the opinion was written by Lehman, J. There it was stated: 'What we have said is, of course, intended to apply only to the scope of the inquiry upon a writ of habeas corpus at common law, and under the procedure in this state. Its scope in the courts of the United States has been extended by the Constitution and statutes as authoritatively construed by the Supreme Court of the United States. In those courts the common-law limitation does not apply that "where a prisoner is held under a judgment of conviction by a court having jurisdiction * * * habeas corpus is not an available remedy, save for want of jurisdiction appearing upon the face of the record of the court wherein he was convicted." The rule at the common law, and under the act of 31 Car. II c. 2 * * * seems to have been that a showing in the return to a writ of habeas corpus * * * based upon a judgment or decree of a court of competent jurisdiction, closed the inquiry. So it was held, under the judiciary act of 1789 (ch. 20, sec. 14, 1 Stat. 73, 81), in Ex parte Watkins (3 Pet. 193, 202, * * *. But when Congress in the act of February 5, 1867 (ch. 28, 14 Stat. 385) extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of the Constitution or a law or treaty of the United States, procedural regulations were included, now found in Rev. Stat. sections 754-761. * * * The effect is to substitute for the bare legal review that seems to

> have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the cause of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require"' (Frank v. Mangum, U. S. 309, 329-331). No such extension has been made by Constitution, statute or judicial decision in this State" (*State Record*, 638-641).

It is manifest from said opinion, as well as the controlling decisions in New York State, that the relator could in no way expect relief under a writ of habeas corpus for cruel and unusual punishments inasmuch as the New York courts will only concern themselves with the questions of regularity of the executive warrant and identity and presence in the demanding state of the person charged. *Peo. ex rel. Whitfield* v. *Enright* (1921), 117 Misc. 448, 191 N. Y. S. 491; *Peo. ex rel. Reid* v. *Warden* (1946), 63 N. Y. S. (2d) 620; *Peo. ex rel. Higley* v. *Millspaw* (1939), 281 N. Y. 441; *Peo. ex rel. Harris* (1936), 158 Misc. 945, 287 N. Y. S. 306; *Peo. ex rel. Hauptman* v. *Hanley* (1935), 153 Misc. 61, 274 N. Y. S. 813, aff'd (1935) 242 App. Div. 257, 274 N. Y. S. 824; *Peo.* v. *Moore* (1915), 167 App. Div. 479, aff'd 217 N. Y. 632.

It is apparent from the said opinion in the State Court that even if the court had found as a matter of fact that the petitioner had been accorded cruel and unusual punishments and further would continue to receive such punishments if returned, that court as a matter of law would have dismissed the writ of habeas corpus.

C. The District Court did not treat the matter as one calling for an exercise of its discretion but instead held as a matter of law that claims of cruel and unusual punishments could not be considered on a writ of habeas corpus and such constituted reversible error.

The District Court by opinion stated "He complains of alleged brutal treatment while he was a prisoner and professes a fear of assassination upon his return. These claims cannot be considered on his application".

This holding is directly contrary to the holding in *Johnson* v. *Dye,* 175 Fed (2d) 250, reversed on other grounds 338 U. S. 86, wherein the Court of Appeals for the Third Circuit held that cruel and unusual punishments justified the discharge of a petitioner under a writ of habeas corpus.

This court has held that if the punishment for an offense were manifestly cruel and unusual it would be the duty of the court to hold that it comes within the constitutional prohibitions. *In re Kemmler,* 136 U. S. 436. Therefore the question as to whether or not petitioner herein had been subjected to cruel and unusual punishments could only be determined by a trial of the facts and the District Court in holding as a matter of law that claims of cruel and unusual punishments could not be considered instead of proceeding to a hearing and determining the question of fact committed reversible error.

POINT II

The infliction of cruel and unusual punishments by a state officer upon a prisoner in his custody is violative of the XIVth Amendment to the United States Constitution and relief by way of habeas corpus should be granted.

The District Court in its opinion held in essence that cruel and unusual punishments even to the degree of possible assassination cannot be considered upon an applica-

tion for a writ of habeas corpus. This holding seems directly contrary to the XIVth Amendment to the United States Constitution and constitutes a denial of due process of law to the petitioner herein.

The freedom from cruel and unusual punishments guaranteed by the VIIIth Amendment has been held applicable to State action under the due process clause of the XIVth Amendment. In *Francis* v. *Rosweber,* 329 U. S. 450, Mr. Justice Frankfurter in a concurring opinion stated, in essence, that no particular criterion of cruel and unusual punishment can be established but that each case must be decided on its own particular circumstances. At page 479 he stated:

> "When the Fourteenth Amendment first came here for application, the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within or without the due process clause must inevitably be left to 'the gradual process of judicial inclusion or exclusion as the cases presented for decision shall require with the reasoning on which such decisions may be founded'."

The principle thus enunciated seems to be that existing social and judicial attitudes taken in conjunction with the particular circumstances of each case must govern in the application of the VIIIth Amendment to determine if a violation of the due process clause has occurred or will occur. See also *Screws* v. *U. S.,* 325 U. S. 91, involving a Georgia sheriff who was indicted and convicted of violating Section 30 of the Criminal Code, 19 U. S. C. 52, in beating to death a Negro prisoner in his custody. This Federal statute was enacted to implement the XIVth Amendment by making it a criminal offense for a public officer to deprive anyone of the "rights, privileges or immunities" secured by the United States Constitution. See also *Johnson* v. *Dye,* 175 Fed. (2d) 250, rev'd 338 U. S. 86.

The foregoing point is further evidenced by *In re Kemmler,* 136 U. S. 436, wherein it was held that death by electrocution was not violative of the VIIIth Amendment. However, at page 446 the court stated:

> "So that if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

Further, as stated in *Johnson* v. *Dye,* 175 Fed. (2d) 250, rev'd on other grounds 338 U. S. 86:

> "And it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of Georgia. The fact that a state officer acts illegally cannot relieve a state of responsibility for his acts. Screws v. United States, 325 U. S. 91."

Therefore, a prisoner who is subjected to cruel and unusual punishments in violation of the VIIIth Amendment comes within the purview of the due process clause of the XIVth Amendment. *Palko* v. *Conn.,* 302 U. S. 319; see also *Solesbee* v. *Balkcom,* No. 77, United States Supreme Court, October Term, 1949, decided February 20, 1950.

This now brings us to a consideration of exactly what remedy is available for relief from the infliction of cruel and unusual punishments at the hands of a State officer. Both the District Court and the State Court in their respective opinions herein held that cruel and unusual punishments are not sufficient grounds for relief by way of habeas corpus in the renditing State and if litigated at all it should be done in the courts of the demanding State.

Any remedy available must fall within one of two classes, either administrative or judicial, and whichever class it falls within the remedy must be absolute or otherwise the due process clause of the XIVth Amendment becomes ineffective.

A. Administrative Remedy

It seems obvious that where the cruel and unusual punishments are being inflicted by the prisoner's jailers, that said jailers are not going to permit the prisoner to avail himself of an administrative remedy if exclusion of the remedy is within their control. The prisoner is subject to the jailers' whim and fancy and in order to pursue any administrative remedy would have to apply, in order to comply with required procedural aspects, to the persecuting jailers. In the alternative, the prisoner may have resort to assistance outside of his jailers. In either event the perpetrators of the cruel and unusual punishments would immediately gain knowledge that an administrative remedy was being sought by the abused prisoner as a result of modern penal censoring devices. The prisoner then becomes subject to severe reprisals at the hands of his custodians. This is particularly true where, as in the instant proceeding, the prisoner is a Negro in a penal camp in the southern states of this country.

Furthermore, there is no known administrative remedy that is absolute in its application. Normally this type of remedy is not sought due to a fear of reprisal and possible assassination at the hands of the custodians.

B. Judicial remedy

A search of the statutes of the several states does not disclose any positive procedural statutory remedy for a prisoner for relief from cruel and unusual punishments at the hands of his jailers. Inasmuch as the VIIIth and XIVth Amendments prohibit such punishments, a judicial remedy must be available or else the amendments are unenforceable pronouncements. Obviously the VIIIth and XIVth Amendments were intended by their enactors to be effectively enforced by the judiciary and therefore a judicial remedy is available.

Inasmuch as a judicial remedy is available, then in what procedural manner can the remedy be sought? There is no

procedural statute setting forth the judicial process to be invoked nor does any statute create the methods to secure the remedy.

The prisoner's conviction and subsequent confinement under sentence being valid preclude the use of any judicial remedy based upon the proceedings resulting in his conviction. The cruel and unusual punishments inflicted during confinement under sentence operates as an unlawful detention and in effect results in a forfeiture of the State's right to the custody of the prisoner in view of the prohibition under the VIIIth and XIVth Amendments. *Johnson* v. *Dye,* 175 Fed. (2d) 250, reversed on other grounds 338 U. S. 86.

The only process available in such an event is the writ of habeas corpus to inquire into the cause of detention.

POINT III

Where this Court has denied a petitioner a stay of State Court rendition proceedings pending application for a writ of certiorari to the State Appellate Court such denial constitutes an exhaustion of all available State remedies.

In most applications to this court for writs of certiorari to a State Appellate Court the petitioner is not only within the jurisdiction of the State Court but is not in any danger of removal. Therefore, except in death penalty cases, a stay of State Court proceedings is not essential to the application to this court for a writ of certiorari to the State Appellate Court. Unlike the aforementioned types of applications, the petitioner herein necessarily needed a stay of the State Court proceedings in order to apply for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York. If a stay of proceedings was not secured the rendition warrant would

be executed and the petitioner herein removed outside of the jurisdiction of the State Court prior to the determination by this court of any application for a writ of certiorari. Therefore, when petitioner was denied a stay of proceedings by this court pending application for certiorari to the State Appellate Court, said denial exhausted all available State remedy as contemplated by Title 28, §2254, U. S. C.

If it were held otherwise, then a petitioner held under rendition proceedings would be denied access to the Federal Court in the renditing State where a stay of State Court proceedings was denied.

CONCLUSION

For the reasons stated in this brief and petition, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit herein.

Respectfully submitted,

CURTIS F. MCCLANE,
Counsel for Petitioner.

APPENDIX

Statutes Involved

Title 28, United States Code

§2241. *Power to grant writ*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

* * *

§2243. *Issuance of writ; return; hearing; decision*

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

* * *

Unless the application for a writ and return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

* * *

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§2244. *Finality of determination*

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

§2254. *State custody; remedies in State courts*

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question involved.